

CASES AND MATERIALS
THE LAW OF EVIDENCE

EDITED BY J. B. MILNER

CHAPTER I pp. 1-38

Storage
KF
8935
ZA2
M56
1952
v.1

Storage
KF
8935
Za2
m5b
1952
v.1

CASES AND MATERIALS

o n

THE LAW OF EVIDENCE

Edited
by

JAMES B. MILNER,
School of Law,
University of Toronto,
Toronto.

Addenda *Dominion + Provincial Reg Act* p. 75
 Model Code Rules 511, 521 p. 239

TABLE OF CONTENTS

CHAPTER I. THE ADVERSARY SYSTEM

(a) The Trial Court: Functions of Judge, Jury and Counsel, p. 1

- (1932) Martin v. Canadian Pacific Railway, p. 1
 (1877) The Metropolitan Railway Co. v. Jackson, p. 3
 (1882) Metropolitan Asylum District v. Hill, p. 8
 (1839) Winslow v. Bailey, p. 9
 (1920) Coghlan v. White, p. 11
 Model Code, Rule 11, p. 13.
 (1910) In re Enoch and Zaretsky, Bock & Co.'s Arbitration, p. 14
 (1927) Rex v. Dora Harris, p. 17
 (1890) Regina v. Petrie, p. 20 + S. Chamber + Murphy
 (1949) Fowler v. Fowler and Jackson, p. 21 + Jones + Jones
 (1952) Rex v. Carey, p. 22
 S. 1054A of the Criminal Code, p. 24
 Rule 268, Supreme Court of Ontario Rules of Practice, p. 25
 Rule 269, Supreme Court of Ontario Rules of Practice, p. 25
 Model Code, Rule 105(d), p. 25
 (1940) The King v. City of Westminster Assessment Committee, p. 26

(b) In the Appellate Courts, p. 27

- (1937) McCannell v. McLean, p. 27
 (1947) Watt or Thomas v. Thomas, p. 30
 The Judicature Act, R.S.O. 1950, c. 190, p. 32
 Criminal Code, S. 1014(2), p. 33
 (1896) George Bray v. John Rawlinson Ford, p. 33
 (1888) Jacker v. The International Cable Co. Ltd., p. 36
 (1909) Rex v. Farrell, p. 36
 Model Code, Rule 6, p. 37
 Model Code, Rule 7, p. 38

(c) *evidence rules discarded by statute: C. 326, S. 8. and see p. 154 here*

CHAPTER II. LEGAL REASONING IN THE DETERMINATION OF FACTS

(a) Judicial Notice, p. 39

1. General Rules, p. 39

- Morgan, Judicial Notice, p. 39
 Davis, Administrative Law, p. 41
 Model Code, Rule 801, p. 42
 Model Code, Rule 802, p. 42
 Model Code, Rules 803, 804, 805, 806, p. 43
 (1940) McQuaker v. Goddard, p. 44

2. In the Process of Interpretation, p. 47

- (1382) Griffiths v. The Earl of Dudley, p. 47
 Fuller, Basic Contract Law, p. 49
 (1914) Camden v. Commissioners of Inland Revenue, p. 54
 (1947) Repouille v. United States, p. 56
 Re Labour Relations Board (Nova Scotia) (1952), p. 58

3. In Constitutional Cases, p. 61

- (1938) In the Matter of Three Bills Passed by the Legislative Assembly of the Province of Alberta, p. 61.
 Canadian Companies: Proceedings in the Judicial Committee of the Privy Council, p. 63
 The Brandeis Brief, p. 64
 (1924) Duff Development Co. Ltd. v. Government of Kelantan, p. 66

4. Local and Foreign Law, p. 70

- (1839) Stockdale v. Hansard, p. 70
- (1950) Walker v. Walker, p. 70
- (1910) Ward v. Serrell, p. 73
- (1952) Regina v. Snelling, p. 73
- Interpretation Act, R.S.O. 1950, p. 74
- The Criminal Code, S. 1128, p. 74
- The Canada Evidence Act, ss. 17, 18, p. 75

*See also, Dominion
The Regulations Act
c. 50, 1950, s. 8*

*Ontario,
The Regulations Act
c. 337, s. 3 (4)*

5. "Scientific Facts" "Beyond Controversy", p. 75

- (1951) Preston-Jones v. Preston-Jones, p. 75

*Municipal Act s. 4
(1) and (2)*

6. Juries, p. 81

- (1836) Rex v. Frederick Rosser, p. 81
- Model Code, Rule 302, p. 82

(b) Opinion and Expert Testimony, p. 82

- (1670) Bushell's Case, p. 82
- Model Code, Rule 401, p. 82
- (1849) Fryer v. Gathercole, p. 83
- (1947) Rex v. German, p. 85
- (1952) Regina v. Smith, p. 86
- (1933) Pitre v. The King, p. 90
- The Canada Evidence Act, s. 8, p. 96
- (1782) Folkes v. Chadd, p. 96
- (1850) Bristow v. Sequeville, p. 98
- (1903) Wilson v. Wilson, p. 99
- (1931) Kelliher v. Smith, p. 100
- The Canada Evidence Act, s. 7, p. 104
- The Ontario Evidence Act, s. 10, p. 104
- The Alberta Evidence Act, s. 10, p. 104
- Model Code, Rule 401, p. 105
- Model Code, Rules 402, 403, 404, 405, p. 106
- Model Code, Rules 406, 407, 408, 409, 410, p. 107

Morgan

(c) Logical Relevance and Legal Admissibility, p. 108

1. Logical Relevance in Matters of Evidence, p. 108

- Morgan, Introduction to Evidence, p. 108
- Fuller, American Legal Realism, p. 109

2. Relevant Evidence that is Inadmissible:
Principal Exceptions, p. 111

(a) Remoteness, prejudice, surprise and novelty.

- Model Code, Rule 303, p. 112
- Sornberger v. Canadian Pacific R.W. Co. (1897), p. 112
- (1950) Gray v. LaFleche, p. 116
- (1951) Bowhey v. Theakston, p. 119
- (1910) Rex v. Hughes, p. 124
- (1862) Line v. Taylor, p. 125
- (1896) Hindson v. Ashby, p. 126
- (1950) Army & Navy v. Retail Union, p. 127
- Armory v. Delamirie, p. 131
- (1944) Hocking v. Ahlquist Bros. Ltd., p. 132
- (1947) Wright's Can. Ropes Ltd. v. M.N.R., p. 133

(b) The Hearsay Rule.

- Morgan, Hearsay Dangers and the Application of
the Hearsay Concept, p. 135
- (1790) Rex v. Eriswell, p. 142
- (1836) Stobart v. Dryden, p. 145

*Sutherland
Thea Knight
Thea Davidson*



Digitized by the Internet Archive
in 2017

- (1837) Wright v. Tatham, p. 147
- (1838) Wright v. Tatham, p. 151
- Model Code, Rule 501, p. 155
- Model Code, Rule 503, p. 155
- Model Code, Rule 1(15), p. 155

(c) Similar Acts: Character Reputation and Intent.

- ✓ (1894) Makin v. A.-G. for New South Wales, p. 156
- (1906) Rex v. Bond, p. 161
- (1915) Rex v. Smith, p. 165
- (1913) Rex v. Rodley, p. 167
- ✓ (1949) Noor Mohamed v. The King, p. 170
- (1918) Brunet v. The King, p. 175
- (1928) Brunet v. The King, p. 181
- (1935) Rex v. Anderson, p. 182
- ✓ (1947) Rex v. Campbell, p. 188
- (1943) Rex v. Akerele, p. 196
- (1874) The Queen v. Francis, p. 197
- ✓ (1952) Rex v. Harris, p. 198
- (1910) King v. Fisher, p. 201
- (1865) Reg. v. Rowton, p. 202
- (1882) Scott v. Sampson, p. 211
- Model Code, Rule 304, p. 214
- Model Code, Rule 305, p. 214
- Modus Operandi, p. 215

(d) Previous Judicial Records and Evidence.

- (1881) Llanover v. Homfray, p. 219
- (1894) Walkerton v. Erdman, p. 221
- (1911) Re Crippen, p. 225
- ✓ (1943) Hollington v. Hewthorn, p. 228
- ✓ (1943) General Medical Council v. Spackman, p. 234
- ✓ (1951) Rex v. Harrison-Owen, p. 239

(e) Subsequent Acts.

- ✓ (1899) Reg. v. Rhodes, p. 240
- ✓ (1919) Hamilton v. Quaker Oats Co., p. 242
- Model Code, Rule 308, p. 243
- Model Code, Rule 309, p. 243

(d) Burden of Proof and Presumptions.

1. Definitions and concepts, p. 243

- (1904) Winans v. Attorney-General, p. 243
- The Judicature Act, c. 190, s.57, p. 245
- Denning, Freedom Under the Law, p. 246
- Model Code, Rule 1, p. 246
- (1926) Ont. Equitable Life and Accident Insur. Co. v. Baker, p. 246

2. Allocation of the Burden of Proof, p. 249

- Plucknett, A Concise History of the Common Law, p. 249
- (1935) Woolmington v. The Director of Public Prosecutions, p. 249
- (1942) Jos. Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd., p. 253
- (1816) Rex v. Turner, p. 256
- (1932) Winnipeg Electric Co. v. Jacob Geel, p. 257

3. The Degree of Proof, p. 260

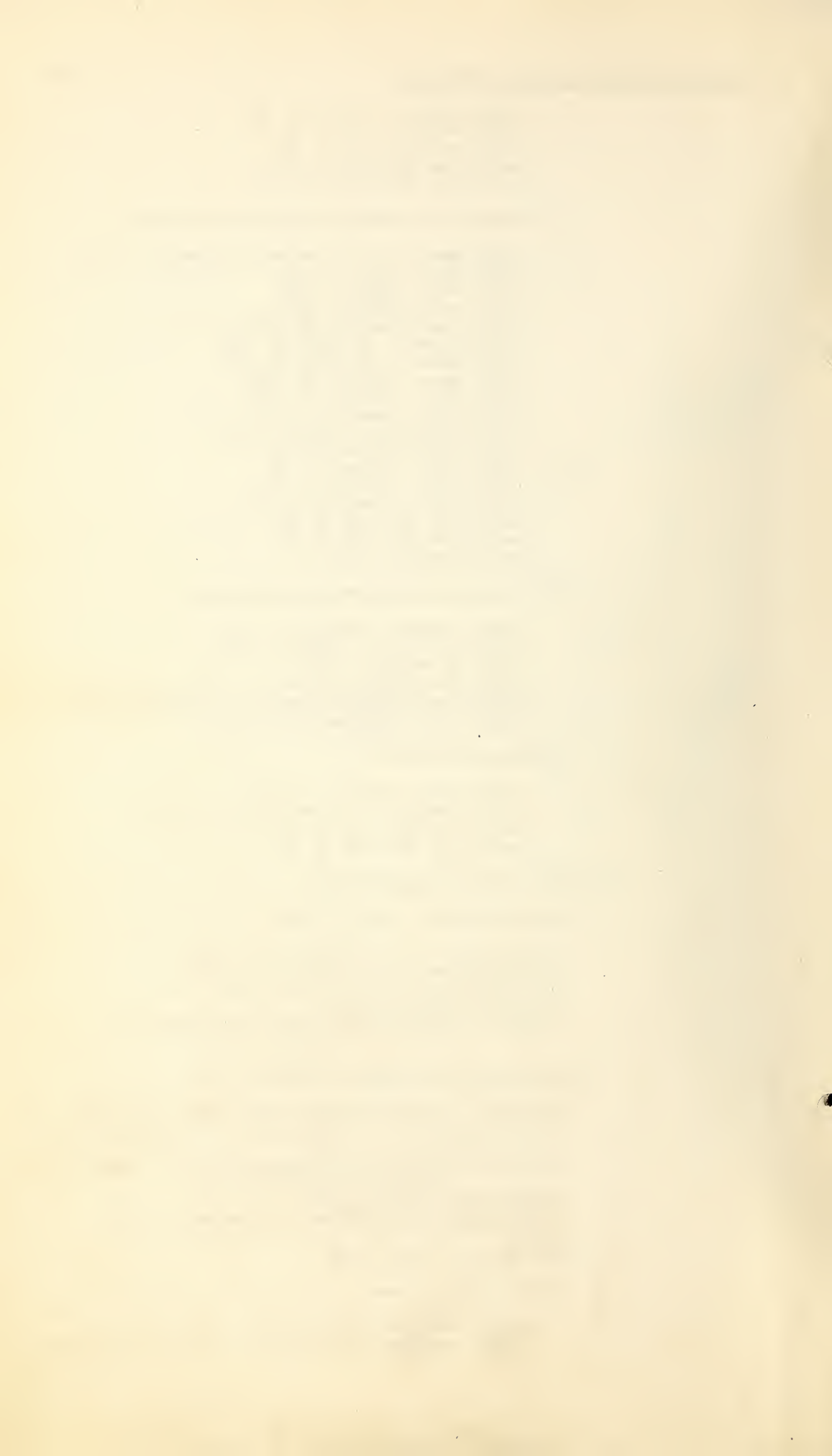
(a) In Criminal Cases.

- (1950) Bater v. Bater, p. 260
- (1935) Woolmington v. Director of Public Prosecutions, p. 261

Thomson v. King
[1918] A.C. 221

start?

1900, 1901, 1902
1903, 1904, 1905
1906, 1907, 1908
1909, 1910, 1911
1912, 1913, 1914
1915, 1916, 1917
1918, 1919, 1920
1921, 1922, 1923
1924, 1925, 1926
1927, 1928, 1929
1930, 1931, 1932
1933, 1934, 1935
1936, 1937, 1938
1939, 1940, 1941
1942, 1943, 1944
1945, 1946, 1947
1948, 1949, 1950
1951, 1952, 1953
1954, 1955, 1956
1957, 1958, 1959
1960, 1961, 1962
1963, 1964, 1965
1966, 1967, 1968
1969, 1970, 1971
1972, 1973, 1974
1975, 1976, 1977
1978, 1979, 1980
1981, 1982, 1983
1984, 1985, 1986
1987, 1988, 1989
1990, 1991, 1992
1993, 1994, 1995
1996, 1997, 1998
1999, 2000, 2001
2002, 2003, 2004
2005, 2006, 2007
2008, 2009, 2010
2011, 2012, 2013
2014, 2015, 2016
2017, 2018, 2019
2020, 2021, 2022
2023, 2024, 2025
2026, 2027, 2028
2029, 2030, 2031
2032, 2033, 2034
2035, 2036, 2037
2038, 2039, 2040
2041, 2042, 2043
2044, 2045, 2046
2047, 2048, 2049
2050, 2051, 2052
2053, 2054, 2055
2056, 2057, 2058
2059, 2060, 2061
2062, 2063, 2064
2065, 2066, 2067
2068, 2069, 2070
2071, 2072, 2073
2074, 2075, 2076
2077, 2078, 2079
2080, 2081, 2082
2083, 2084, 2085
2086, 2087, 2088
2089, 2090, 2091
2092, 2093, 2094
2095, 2096, 2097
2098, 2099, 2100
2101, 2102, 2103
2104, 2105, 2106
2107, 2108, 2109
2110, 2111, 2112
2113, 2114, 2115
2116, 2117, 2118
2119, 2120, 2121
2122, 2123, 2124
2125, 2126, 2127
2128, 2129, 2130
2131, 2132, 2133
2134, 2135, 2136
2137, 2138, 2139
2140, 2141, 2142
2143, 2144, 2145
2146, 2147, 2148
2149, 2150, 2151
2152, 2153, 2154
2155, 2156, 2157
2158, 2159, 2160
2161, 2162, 2163
2164, 2165, 2166
2167, 2168, 2169
2170, 2171, 2172
2173, 2174, 2175
2176, 2177, 2178
2179, 2180, 2181
2182, 2183, 2184
2185, 2186, 2187
2188, 2189, 2190
2191, 2192, 2193
2194, 2195, 2196
2197, 2198, 2199
2200, 2201, 2202
2203, 2204, 2205
2206, 2207, 2208
2209, 2210, 2211
2212, 2213, 2214
2215, 2216, 2217
2218, 2219, 2220
2221, 2222, 2223
2224, 2225, 2226
2227, 2228, 2229
2230, 2231, 2232
2233, 2234, 2235
2236, 2237, 2238
2239, 2240, 2241
2242, 2243, 2244
2245, 2246, 2247
2248, 2249, 2250
2251, 2252, 2253
2254, 2255, 2256
2257, 2258, 2259
2260, 2261, 2262
2263, 2264, 2265
2266, 2267, 2268
2269, 2270, 2271
2272, 2273, 2274
2275, 2276, 2277
2278, 2279, 2280
2281, 2282, 2283
2284, 2285, 2286
2287, 2288, 2289
2290, 2291, 2292
2293, 2294, 2295
2296, 2297, 2298
2299, 2300, 2301
2302, 2303, 2304
2305, 2306, 2307
2308, 2309, 2310
2311, 2312, 2313
2314, 2315, 2316
2317, 2318, 2319
2320, 2321, 2322
2323, 2324, 2325
2326, 2327, 2328
2329, 2330, 2331
2332, 2333, 2334
2335, 2336, 2337
2338, 2339, 2340
2341, 2342, 2343
2344, 2345, 2346
2347, 2348, 2349
2350, 2351, 2352
2353, 2354, 2355
2356, 2357, 2358
2359, 2360, 2361
2362, 2363, 2364
2365, 2366, 2367
2368, 2369, 2370
2371, 2372, 2373
2374, 2375, 2376
2377, 2378, 2379
2380, 2381, 2382
2383, 2384, 2385
2386, 2387, 2388
2389, 2390, 2391
2392, 2393, 2394
2395, 2396, 2397
2398, 2399, 2400
2401, 2402, 2403
2404, 2405, 2406
2407, 2408, 2409
2410, 2411, 2412
2413, 2414, 2415
2416, 2417, 2418
2419, 2420, 2421
2422, 2423, 2424
2425, 2426, 2427
2428, 2429, 2430
2431, 2432, 2433
2434, 2435, 2436
2437, 2438, 2439
2440, 2441, 2442
2443, 2444, 2445
2446, 2447, 2448
2449, 2450, 2451
2452, 2453, 2454
2455, 2456, 2457
2458, 2459, 2460
2461, 2462, 2463
2464, 2465, 2466
2467, 2468, 2469
2470, 2471, 2472
2473, 2474, 2475
2476, 2477, 2478
2479, 2480, 2481
2482, 2483, 2484
2485, 2486, 2487
2488, 2489, 2490
2491, 2492, 2493
2494, 2495, 2496
2497, 2498, 2499
2500, 2501, 2502
2503, 2504, 2505
2506, 2507, 2508
2509, 2510, 2511
2512, 2513, 2514
2515, 2516, 2517
2518, 2519, 2520
2521, 2522, 2523
2524, 2525, 2526
2527, 2528, 2529
2530, 2531, 2532
2533, 2534, 2535
2536, 2537, 2538
2539, 2540, 2541
2542, 2543, 2544
2545, 2546, 2547
2548, 2549, 2550
2551, 2552, 2553
2554, 2555, 2556
2557, 2558, 2559
2560, 2561, 2562
2563, 2564, 2565
2566, 2567, 2568
2569, 2570, 2571
2572, 2573, 2574
2575, 2576, 2577
2578, 2579, 2580
2581, 2582, 2583
2584, 2585, 2586
2587, 2588, 2589
2590, 2591, 2592
2593, 2594, 2595
2596, 2597, 2598
2599, 2600, 2601
2602, 2603, 2604
2605, 2606, 2607
2608, 2609, 2610
2611, 2612, 2613
2614, 2615, 2616
2617, 2618, 2619
2620, 2621, 2622
2623, 2624, 2625
2626, 2627, 2628
2629, 2630, 2631
2632, 2633, 2634
2635, 2636, 2637
2638, 2639, 2640
2641, 2642, 2643
2644, 2645, 2646
2647, 2648, 2649
2650, 2651, 2652
2653, 2654, 2655
2656, 2657, 2658
2659, 2660, 2661
2662, 2663, 2664
2665, 2666, 2667
2668, 2669, 2670
2671, 2672, 2673
2674, 2675, 2676
2677, 2678, 2679
2680, 2681, 2682
2683, 2684, 2685
2686, 2687, 2688
2689, 2690, 2691
2692, 2693, 2694
2695, 2696, 2697
2698, 2699, 2700
2701, 2702, 2703
2704, 2705, 2706
2707, 2708, 2709
2710, 2711, 2712
2713, 2714, 2715
2716, 2717, 2718
2719, 2720, 2721
2722, 2723, 2724
2725, 2726, 2727
2728, 2729, 2730
2731, 2732, 2733
2734, 2735, 2736
2737, 2738, 2739
2740, 2741, 2742
2743, 2744, 2745
2746, 2747, 2748
2749, 2750, 2751
2752, 2753, 2754
2755, 2756, 2757
2758, 2759, 2760
2761, 2762, 2763
2764, 2765, 2766
2767, 2768, 2769
2770, 2771, 2772
2773, 2774, 2775
2776, 2777, 2778
2779, 2780, 2781
2782, 2783, 2784
2785, 2786, 2787
2788, 2789, 2790
2791, 2792, 2793
2794, 2795, 2796
2797, 2798, 2799
2800, 2801, 2802
2803, 2804, 2805
2806, 2807, 2808
2809, 2810, 2811
2812, 2813, 2814
2815, 2816, 2817
2818, 2819, 2820
2821, 2822, 2823
2824, 2825, 2826
2827, 2828, 2829
2830, 2831, 2832
2833, 2834, 2835
2836, 2837, 2838
2839, 2840, 2841
2842, 2843, 2844
2845, 2846, 2847
2848, 2849, 2850
2851, 2852, 2853
2854, 2855, 2856
2857, 2858, 2859
2860, 2861, 2862
2863, 2864, 2865
2866, 2867, 2868
2869, 2870, 2871
2872, 2873, 2874
2875, 2876, 2877
2878, 2879, 2880
2881, 2882, 2883
2884, 2885, 2886
2887, 2888, 2889
2890, 2891, 2892
2893, 2894, 2895
2896, 2897, 2898
2899, 2900, 2901
2902, 2903, 2904
2905, 2906, 2907
2908, 2909, 2910
2911, 2912, 2913
2914, 2915, 2916
2917, 2918, 2919
2920, 2921, 2922
2923, 2924, 2925
2926, 2927, 2928
2929, 2930, 2931
2932, 2933, 2934
2935, 2936, 2937
2938, 2939, 2940
2941, 2942, 2943
2944, 2945, 2946
2947, 2948, 2949
2950, 2951, 2952
2953, 2954, 2955
2956, 2957, 2958
2959, 2960, 2961
2962, 2963, 2964
2965, 2966, 2967
2968, 2969, 2970
2971, 2972, 2973
2974, 2975, 2976
2977, 2978, 2979
2980, 2981, 2982
2983, 2984, 2985
2986, 2987, 2988
2989, 2990, 2991
2992, 2993, 2994
2995, 2996, 2997
2998, 2999, 3000
3001, 3002, 3003
3004, 3005, 3006
3007, 3008, 3009
3010, 3011, 3012
3013, 3014, 3015
3016, 3017, 3018
3019, 3020, 3021
3022, 3023, 3024
3025, 3026, 3027
3028, 3029, 3030
3031, 3032, 3033
3034, 3035, 3036
3037, 3038, 3039
3040, 3041, 3042
3043, 3044, 3045
3046, 3047, 3048
3049, 3050, 3051
3052, 3053, 3054
3055, 3056, 3057
3058, 3059, 3060
3061, 3062, 3063
3064, 3065, 3066
3067, 3068, 3069
3070, 3071, 3072
3073, 3074, 3075
3076, 3077, 3078
3079, 3080, 3081
3082, 3083, 3084
3085, 3086, 3087
3088, 3089, 3090
3091, 3092, 3093
3094, 3095, 3096
3097, 3098, 3099
3100, 3101, 3102
3103, 3104, 3105
3106, 3107, 3108
3109, 3110, 3111
3112, 3113, 3114
3115, 3116, 3117
3118, 3119, 3120
3121, 3122, 3123
3124, 3125, 3126
3127, 3128, 3129
3130, 3131, 3132
3133, 3134, 3135
3136, 3137, 3138
3139, 3140, 3141
3142, 3143, 3144
3145, 3146, 3147
3148, 3149, 3150
3151, 3152, 3153
3154, 3155, 3156
3157, 3158, 3159
3160, 3161, 3162
3163, 3164, 3165
3166, 3167, 3168
3169, 3170, 3171
3172, 3173, 3174
3175, 3176, 3177
3178, 3179, 3180
3181, 3182, 3183
3184, 3185, 3186
3187, 3188, 3189
3190, 3191, 3192
3193, 3194, 3195
3196, 3197, 3198
3199, 3200, 3201
3202, 3203, 3204
3205, 3206, 3207
3208, 3209, 3210
3211, 3212, 3213
3214, 3215, 3216
3217, 3218, 3219
3220, 3221, 3222
3223, 3224, 3225
3226, 3227, 3228
3229, 3230, 3231
3232, 3233, 3234
3235, 3236, 3237
3238, 3239, 3240
3241, 3242, 3243
3244, 3245, 3246
3247, 3248, 3249
3250, 3251, 3252
3253, 3254, 3255
3256, 3257, 3258
3259, 3260, 3261
3262, 3263, 3264
3265, 3266, 3267
3268, 3269, 3270
3271, 3272, 3273
3274, 3275, 3276
3277, 3278, 3279
3280, 3281, 3282
3283, 3284, 3285
3286, 3287, 3288
3289, 3290, 3291
3292, 3293, 3294
3295, 3296, 3297
3298, 3299, 3300
3301, 3302, 3303
3304, 3305, 3306
3307, 3308, 3309
3310, 3311, 3312
3313, 3314, 3315
3316, 3317, 3318
3319, 3320, 3321
3322, 3323, 3324
3325, 3326, 3327
3328, 3329, 3330
3331, 3332, 3333
3334, 3335, 3336
3337, 3338, 3339
3340, 3341, 3342
3343, 3344, 3345
3346, 3347, 3348
3349, 3350, 3351
3352, 3353, 3354
3355, 3356, 3357
3358, 3359, 3360
3361, 3362, 3363
3364, 3365, 3366
3367, 3368, 3369
3370, 3371, 3372
3373, 3374, 3375
3376, 3377, 3378
3379, 3380, 3381
3382, 3383, 3384
3385, 3386, 3387
3388, 3389, 3390
3391, 3392, 3393
3394, 3395, 3396
3397, 3398, 3399
3400, 3401, 3402
3403, 3404, 3405
3406, 3407, 3408
3409, 3410, 3411
3412, 3413, 3414
3415, 3416, 3417
3418, 3419, 3420
3421, 3422, 3423
3424, 3425, 3426
3427, 3428, 3429
3430, 3431, 3432
3433, 3434, 3435
3436, 3437, 3438
3439, 3440, 3441
3442, 3443, 3444
3445, 3446, 3447
3448, 3449, 3450
3451, 3452, 3453
3454, 3455, 3456
3457, 3458, 3459
3460, 3461, 3462
3463, 3464, 3465
3466, 3467, 3468
3469, 3470, 3471
3472, 3473, 3474
3475, 3476, 3477
3478, 3479, 3480
3481, 3482, 3483
3484, 3485, 3486
3487, 3488, 3489
3490, 3491, 3492
3493, 3494, 3495
3496, 3497, 3498
3499, 3500, 3501
3502, 3503, 3504
3505, 3506, 3507
3508, 3509, 3510
3511, 3512, 3513
3514, 3515, 3516
3517, 3518, 3519
3520, 3521, 3522
3523, 3524, 3525
3526, 3527, 3528
3529, 3530, 3531
3532, 3533, 3534
3535, 3536, 3537
3538, 3539, 3540
3541, 3542, 3543
3544, 3545, 3546
3547, 3548, 3549
3550, 3551, 3552
3553, 3554, 3555
3556, 3557, 3558
3559, 3560, 3561
3562, 3563, 3564
3565, 3566, 3567
3568, 3569, 3570
3571, 3572, 3573
3574, 3575, 3576
3577, 3578, 3579
3580, 3581, 3582
3583, 3584, 3585
3586, 3587, 3588
3589, 3590, 3591
3592, 3593, 3594
3595, 3596, 3597
3598, 3599, 3600
3601, 3602, 3603
3604, 3605, 3606
3607, 3608, 3609
3610, 3611, 3612
3613, 3614, 3615
3616, 3617, 3618
3619, 3620, 3621
3622, 3623, 3624
3625, 3626, 362



- (1942) Mancini v. Director of Public Prosecutions,
p. 261
- (1937) Rex v. Labine, p. 265
- (1948) Rex v. Sears, p. 267
- (b) In Civil Cases.
 - (1928) The King v. Sincennes-McNaughton Line, p. 269
- (c) Criminal Issues in Civil Cases
 - (1929) The London Life Insurance Co. v. Lang Shirt
Co. Ltd., p. 270
- 4. Presumptions, p. 280
 - (a) Legitimacy.
 - (1952) Welstead v. Brown, p. 280
 - Model Code, Rule 703, p. 285
 - (b) Death.
 - (1869) Re Phene's Trusts, p. 285
 - (1924-25) Re Sell, p. 289
 - The Marriage Act, c. 222, s. 11, p. 290
 - The Legitimation Act, c. 203, s. 5, p. 290
 - (c) Survivorship.
 - The Survivorship Act, c. 382, p. 291
 - The Insurance Act, c. 183, p. 292
 - Uniform Simultaneous Death Act, p. 292
 - (d) Conflicting presumptions.
 - Reg. v. Willshire (1881) p. 293
 - (1946) Re Law, p. 294
 - Model Code, Chapter VIII, p. 296
 - (Rules 701, 702, 704) p. 298-299
- 5. ~~(a)~~ Corroboration.
 - (a) 1. At common law.
 - (1916) Rex v. Baskerville, p. 301
 - (1943) Mattouk v. Massad, p. 304
 - (a) 2. The statutes.
 - Canada Evidence Act, s. 16, p. 306
 - Ontario Evidence Act, ss. 11-13, p. 306
 - The Criminal Code, s. 301(2), 1002-1003, p. 306

CHAPTER III. MISCELLANEOUS PROBLEMS IN THE PRODUCTION OF EVIDENCE.

- (a) Illegally Obtained Evidence, p. 310
 - (1948) Wolf v. Colorado, p. 310
 - Rochin - California - abstract + photo transcription.*
- (b) Administrative Problems in Collecting Evidence, p. 314
 - 1. Agents Provocateurs, p. 314
 - U.K. Report of the Royal Commission on Police Powers
and Procedures, #104-111, p. 314
 - 2. Identification, p. 315
 - Rex v. Dwyer (1925), p. 315

*See 1952 20 C.R.R.
749.*

U.K. Report of the Royal Commission on Police
Powers and Procedure, #123-129, p. 319

3. Competency and Compellability of Witnesses, p. 320

Canada Evidence Act, s. 3, p. 320
Ontario Evidence Act, ss. 3-4, p. 320
Canada Evidence Act, s. 4, p. 320a
Ontario Evidence Act, s. 5, p. 321
(1912) Rex v. Acaster, p. 321
(1931) Rex v. Lapworth, p. 322

(c) Prophylactic Measures to Secure the Truth, the Whole Truth
and Nothing But the Truth, p. 323

1. The Oath, p. 323

(1744) Omychund v. Barker, p. 323
Canada Evidence Act, s. 14, p. 325
Ontario Evidence Act, s. 14, 15(1), p. 325
(1948) Rex v. Bluske, p. 326
(1779) The King v. Brasier, p. 328
Canada Evidence Act, s. 16, p. 328
Criminal Code, s. 1003, p. 329
Reg. v. Hill, (1851), p. 331
Report of the Proceedings of the Canadian Bar
Association, Excessive Use of Affidavits, p. 333
Model Code, Rule 103, p. 334

2. ThProblem^{of} Substitutes, p. 334

Denning, Freedom Under the Law, p. 334
Scientific Gadgets in the Law of Evidence, p. 336

3. Examination in Chief, p. 337

(1913) Maves v. G.T.P. Railway Co., p. 337
(1917) Betts v. Betts and Brodrick, p. 338
(1872) Burgess v. Bennett, p. 338
(1927) Young v. Denton, p. 339
Ontario Rule 254, p. 340
Model Code, Rule 104, p. 340
Model Code, Rule 105(i), p. 340
106.

4. The Proper Limits of Cross-Examination: Relevance,
Previous Convictions, Impeachment, p. 340

(1935) Markadonis v. The King, p. 340
Canada Evidence Act, s. 12, p. 341
Ontario Evidence Act, s. 19, p. 341
(1941) Koufis v. The King, p. 342
(1935) Maxwell v. The Director of Public Prosecutions,
(1951) Rex v. Hammer-Bush (sup. 239 above) p. 343
Ontario Rule 255, p. 346
General Council of the Bar Rules, p. 346
Model Code, Rule 105, p. 347
(1889) Price v. Manning, p. 349
(1825) Ewer v. Ambrose, p. 349
(1859) Greenough v. Eccles, p. 349
Canada Evidence Act, c. 145, ss. 9-11, p. 350
Ontario Evidence Act, ss. 17, 18, 20, p. 351
(1934) Rex v. Kadeshevitz, p. 351
(1947) Deacon v. The King, p. 352
(1867) Reg. v. Brown, p. 354
(1951) Rex v. Gunewardene, p. 355

(d) Privilege, p. 356

1. Against Self-Incrimination and Civil Liability

- (1902) Ex parte Haes, p. 356
Canada Evidence Act, c. 145, s. 5, p. 357
(1947) Tass v. The King, p. 357
Ontario Evidence Act, ss. 7, 8, p. 358
(1905) Rex v. Grinder, p. 359
(1951) Rex v. McIntyre, p. 359
Criminal Code, s. 285, p. 363
Model Code, Rule 201, p. 364
Model Code, Rules 202, 203, 204, 205, p. 365
Model Code, Rules 206, 207, 208, p. 366

2. Against Disclosure of Confidential Communications

- (1925) U.S.A. v. Mammoth Oil Co., p. 366
Model Code, Rule 209, p. 372
Model Code, Rules 210, 211, 212, 213, p. 373
(1881) Wheeler v. Le Marchant, p. 373
(1945) Cook v. Carroll, p. 377
Model Code, Rules 219, 220, p. 382
Model Code, Rules 221, 222, 223, p. 383
Model Code, Rules 224, 225, 226, 229, p. 384
The Ontario Evidence Act, s. 9, p. 385
The Canada Evidence Act, s. 4(3), p. 385
(1939) Shenton v. Tyler, p. 385

3. State Secrets: Public Policy

- Ontario Evidence Act, s. 27, p. 388
The Proceedings Against the Crown Act, s.10, p. 388
(1890) Marks v. Beyfus, p. 392
Reg. v. Richardson, p. 393
The Venereal Diseases Prevention Act, c. 408, p. 394
The Highway Traffic Act, c. 167, p. 394
Ontario Evidence Act, c. 119, p. 396
Model Code, Rules 227, 228, 229, 230, 231, p. 397
Model Code, Rules 232, 233, 234, p. 398

(e) Admissions, p. 398

- Morgan, Admissions as an Exception to the Hearsay Rule, p. 398
(1914) Rex v. Christie, p. 400
(1944) Rex v. Leckey, p. 404
(1877) Bessela v. Stern, p. 405
(1891) Wiedemann v. Walpole, p. 406
(1947) Spring v. Spring and Jiggins, p. 408
(1892) Regina v. Bedere, p. 410
(1919) Jarvis v. London Street R.W. Co., p. 410
Morgan, The Rationale of Vicarious Admissions, p. 411
Model Code, Rule 506, p. 413
Model Code, Rules 507, 508, p. 414

(f) Confessions

- Ibrahim v. Rex, p. 414
Model Code, Rule 505, p. 417
(1893) The Queen v. Thompson, p. 419
(1840) Regina v. Richard Gould, p. 420
(1941) Rex v. Hammond, p. 420
(1944) Rex v. Treacy, p. 422
(1868) Reg. v. Jarvis, p. 424
(1918) Rex v. Voisin, p. 425
Report of the Royal Commission on Police Powers and
Procedure, p. 426
(1941) Rex v. Barker, p. 429
(1909) Rex v. White, p. 430
(1949) Boudreau v. The King, p. 432
(1927) Sankey v. The King, p. 435

STATE OF NEW YORK

IN SENATE,

JANUARY 13, 1876.

REPORT OF THE

COMMISSIONER OF THE

GENERAL LAND OFFICE,

FOR THE YEAR 1875.

ALBANY:

WILLIAM B. EDELL,

PRINTER,

1876.

NEW YORK:

WILLIAM B. EDELL,

PRINTER,

1876.

ALBANY:

WILLIAM B. EDELL,

PRINTER,

1876.

NEW YORK:

WILLIAM B. EDELL,

PRINTER,

1876.

ALBANY:

WILLIAM B. EDELL,

PRINTER,

1876.

NEW YORK:

WILLIAM B. EDELL,

- (1947) Rex v. Deagle, p. 435
- (1951) Rex v. Clark et al, p. 437
- (1945) Schmidt v. The King, p. 439
- (1944) Beatty v. The King, p. 440
- (1946) Rex v. Harris, p. 441
- (1942) Rex v. Byers, p. 443

(g) Documents, p. 445

1. Generally: the "best evidence rule", p. 445

- Ontario Rules of Practice, Rules 348 to 353, p. 445
- (1852) Macdonnell v. Evans, p. 446
- Model Code, Rules 601, 602, p. 447
- Model Code, Rule 603, p. 448

2. Secondary Evidence, p. 448

(a) Where the original is lost or destroyed, p. 448

- (1820) Brewster v. Sewell, p. 449
- (1894) Porter v. Hale, p. 449

(b) Where the original is in the possession of the adversary, p. 450

- (1852) Dwyer v. Collins, p. 450
- (1867) Reg. v. Elworthy, p. 451
- (1864) Reg. v. Farr, p. 453
- (1820) The King v. Hunt, p. 454
- (1834) Doe v. Cockell, p. 455
- (1840) Doe v. Hodgson, p. 455

(c) Where the original is in the possession or power of a stranger, p. 456

- (1853) The Queen v. Llanfaethly, p. 456
- Ontario Rules of Practice, Rule 276, p. 456

(d) Where the original cannot be brought into court: impossibility and extreme inconvenience.

- (1840) Mortimer v. M'Callan, p. 457
- Ontario Evidence Act, ss. 30, 31, p. 457
- Canada Evidence Act, ss. 29, 29a, p. 459

(e) Admissions, p. 461

- (1840) Slatterie v. Pooley, p. 461

(f) Degrees of remoteness from the original

- (1840) Doe v. Ross, p. 461

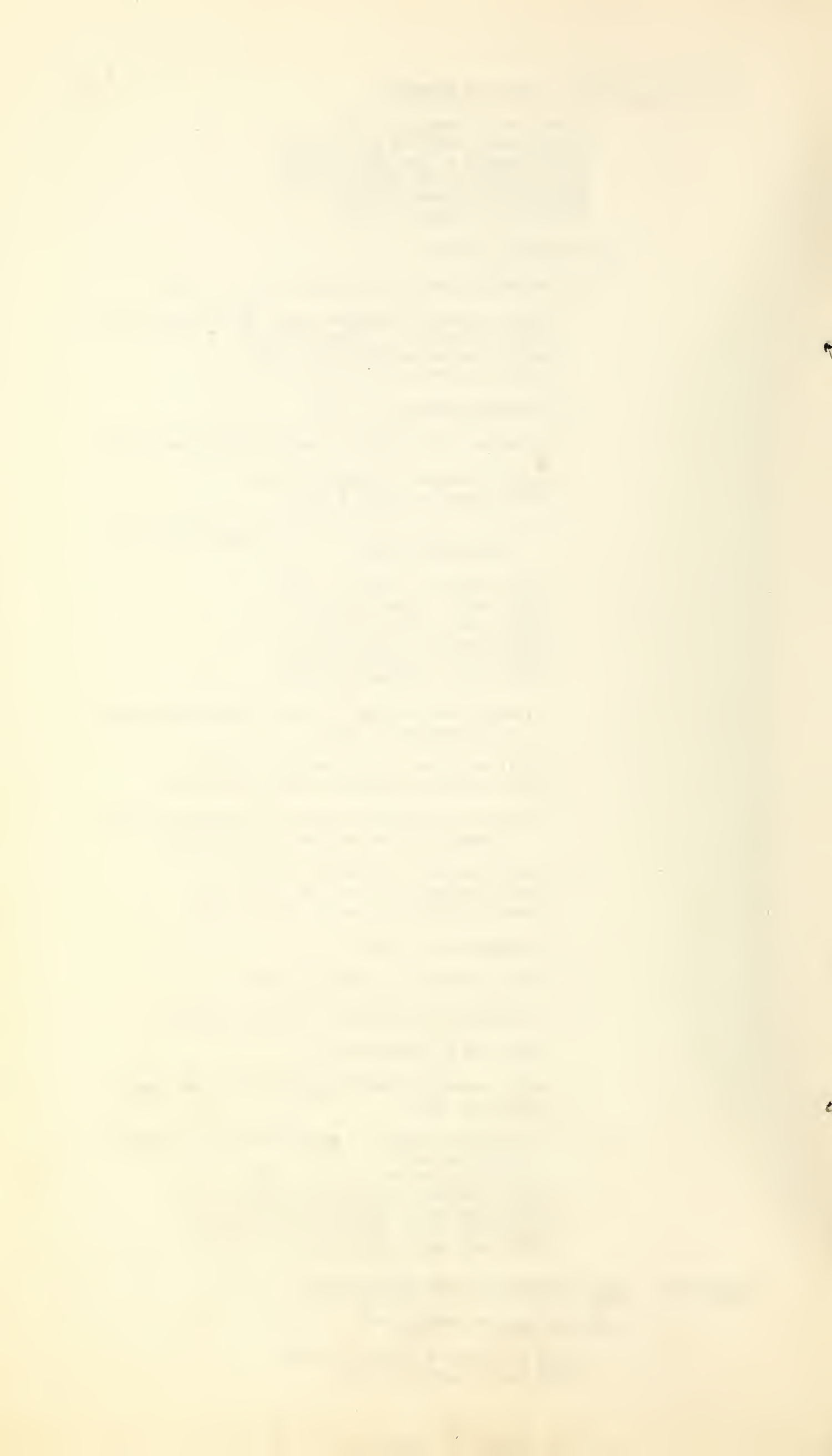
3. Public documents: herein especially of the hearsay problem, p. 462

- Thrasyvoulos Ioannou v. Papa Christoforos Demetriou (1952), p. 462
- Canada Evidence Act, s. 25, p. 466
- Ontario Evidence Act, s. 26, p. 466
- Model Code, Rules 601, 602, p. 466
- Model Code, Rules 515, 516, 517, p. 467
- Model Code, Rule 521, p. 468

CHAPTER IV. OTHER EXCEPTIONS TO THE HEARSAY RULE

(a) Dying Declarations, p. 469

- (1869) The Queen v. Jenkins, p. 469
- (1909) Rex v. Perry, p. 470



- (1829) Rex v. Pike, p. 471
- (1935) Schwartzenhauer v. The King, p. 472
- (1915) Rex v. Inkster, p. 474

(b) Declarations Against Interest, p. 476

- (1808) Higham v. Ridgway, p. 476
- (1876) Taylor v. Witham, p. 477
- The Limitations Act, c. 207, s.57, p. 478
- (1932) Ellis v. Moore, p. 478
- Model Code, Rule 509, p. 478
- (1947) Walsh v. Cruickshank, p. 479
- (1936) Re Gardner's Will Trusts, p. 481

(c) Statements Made in the Course of Duty, p. 483

- Price v. The Earl of Torrington, p. 483
- (1877) The Henry Coxon, p. 486
- (1878) O'Connor v. Dunn, p. 487
- (1910) Village of Lakefield v. Brown, p. 490
- Ontario Rules of Practice, Rule 418, p. 490
- The Companies Act, R.S.O., c. 59, s. 106, p. 491
- Model Code, Rule 514, p. 491

(d) Declarations About Family History, p. 491

- (1777) Goodright v. Moss, p. 491
- (1884) Walker v. Murray, p. 493
- (1933) Pejepsco Paper Co. v. Farren, p. 493
- (1947) Re Anderson, p. 499
- (1915) Rex v. Spera, p. 500
- Criminal Code, s. 984, p. 501
- Model Code, Rule 524, p. 501

(e) Declarations of Public and General Right, p. 502

- (1813) Weeks v. Sparke, p. 502
- (1837) Thomas v. Jenkins, p. 503
- (1837) The Queen v. Bliss, p. 504
- (1913) Attorney-General v. Horner, p. 505
- Model Code, Rule 525, p. 506
- Model Code, Rule 528, p. 506
- Model Code, Rule 529, p. 506
- Model Code, Rules 530, 531, p. 507

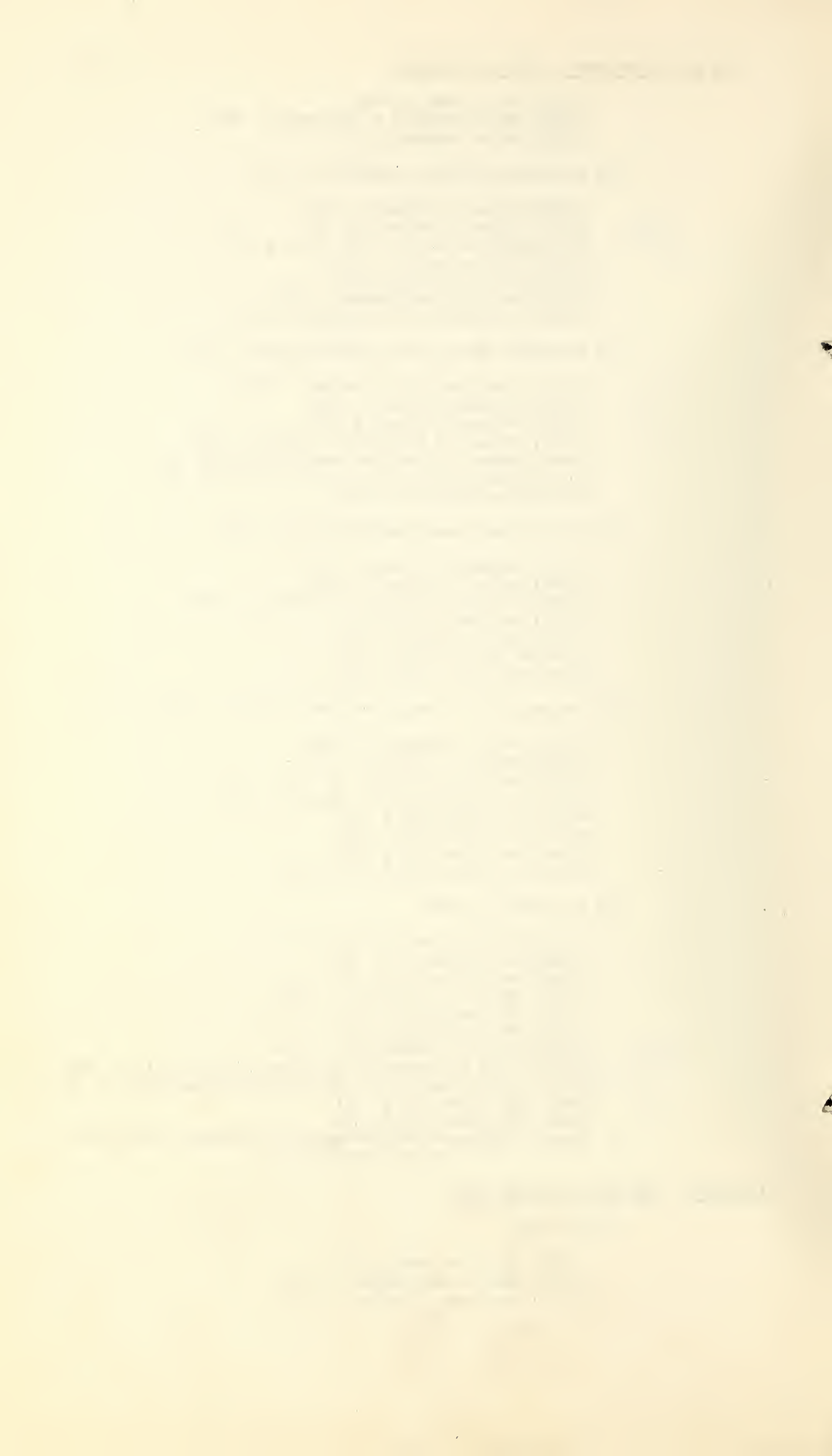
(f) Res Gestae, p. 507

- (1879) Regina v. Bedingfield, p. 507
- Thompson v. Trevanion, p. 508
- (1834) Rex v. Foster, p. 508
- (1907) Gilbert v. The King, p. 509
- (1934) The King v. Wilkinson, p. 510
- (1951) Rex v. Ieland, p. 511
- (1875) Regina v. Wainwright, p. 514
- (1914) Lloyd v. Powell Duffryn Steam Coal Co. Ltd., p. 515
- Maguire, The Hillmon Case--Thirty-Three Years After, p. 519
- Model Code, Rule 512, p. 521
- Model Code, Rule 513, p. 521
- Morgan, Suggested Classification of Utterances Admissible as Res Gestae, p. 521

CHAPTER V. THE PAROL EVIDENCE RULE

(a) The Rule

- (1808) Weston v. Emes, p. 524
- (1833) Goss v. Lord Nugent, p. 525
- (1907) Henderson v. Arthur, p. 527



(b) The Exceptions, p. 528

1. Collateral Agreements, p. 528

- (1871) Morgan v. Griffith, p. 528
- (1901) De Lassalle v. Guildford, p. 529
- (1875) Angell v. Duke, p. 530
- (1913) Heilbut v. Buckleton, p. 531

2. Informal Private Documents, p. 532

- (1838) Allen v. Pink, p. 532
- (1871) Lee v. Lancashire and Yorkshire R.R. Co., p. 533

3. Conditions Precedent, p. 535

- (1856) Pym v. Campbell, p. 535
- (1911) Long v. Smith, p. 536

4. Recession or Variation of the Contract, p. 537

- (1918) Morris v. Baron and Company, p. 537
- (1913) Frith v. Alliance Investment Co., p. 539
- (1922) Stanlake v. Ringhand, p. 542

5. Mistake Founding a Claim for Rectification, p. 543

- (1924) U.S.A. v. Motor Trucks Ltd., p. 543

6. Ambiguity, p. 546

- Hailsham, Evidence, Article 788, p. 546

(c) The Model Code on Parol Evidence, p. 547

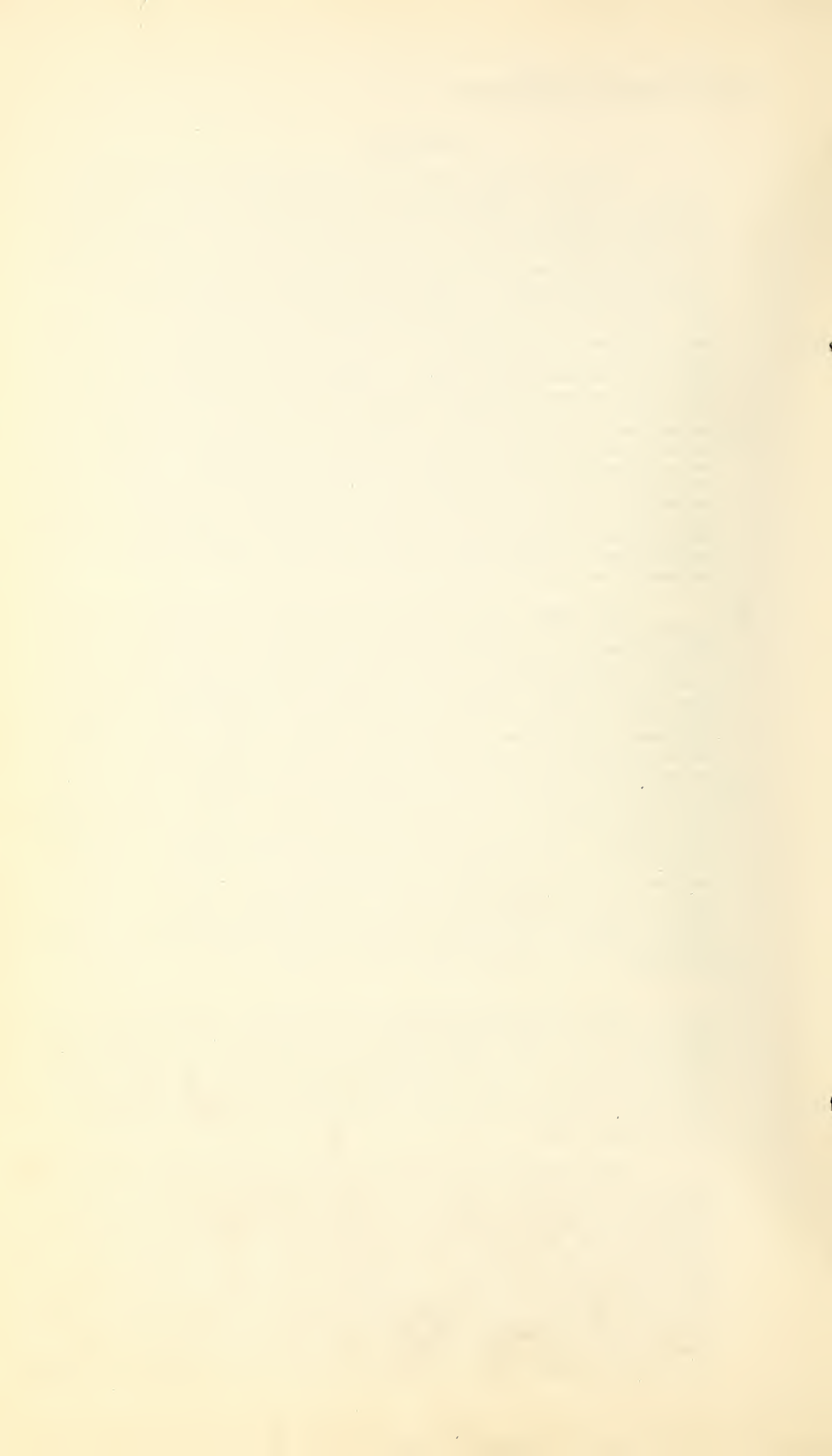
INTRODUCTION

- One might well ask why there is any such animal as the law of evidence. Why cannot judges and juries, the triers of fact, be relied upon to assess evidence at its true value without reference to ancient rules governing its admissibility? What purpose does the law of evidence serve?
- 10 In thinking about these questions it is helpful to keep in mind the nature of our law of evidence and of the systems of procedure in which the law of evidence has its context. In all legal processes, whether legislative (including contractual) or adjudicative, evidence must play an essential part. But not in all processes will there be need for rules, and the rules may vary depending on the process. The most familiar process is of course the judicial, the traditional court trying civil or criminal cases where the law of evidence had its origin. Administrative tribunals, too, must frequently determine facts before adjudicating, so it of necessity faces most, if not all, of the basic problems of evidence. Yet it is common
- 20 ground that the administrative tribunal does not make use of the same rules as the traditional court. Farther down the scale legislative bodies make use of facts to a great extent and for most vital purposes. Yet practically no rules of evidence are applied in our legislatures or parliament. Finally, in the field of contract negotiation obvious reliance is placed on facts, but there is nothing save the individual contractor's common sense governing his assessment of the evidence upon which he acts. What are the differences in these legal processes that justify the use of a rigorous system of evidence at one end and nothing at all on the other?
- 30 To attempt to understand the traditional court rules of evidence you must first think of the historical development of courts to the stage where the parties to a dispute took their dispute to an arbitrator who was a total stranger committed to the proposition that he would settle the dispute on the basis of the facts of the case proved before him and nothing else. Now this total stranger knew nothing of the disputants' affairs at the start. A difficult job of communication must therefore be undertaken with some sense of order and efficiency. Traditionally we have developed and accepted widely the idea that the best channel of communication is the combative trial in a courtroom, in which one party asserts a claim and backs
- 40 it up with his evidence, and his opponent asserts his denial and backs it up with his evidence. It is their dispute, they control it, and the trier of fact sits patiently by interfering only to protect each adversary's interests when asserted. This is sometimes called the adversary system. By way of contrast, in some administrative tribunals the trier of fact is himself a partisan, if only to the extent that he represents an articulated public interest. This is sometimes called the investigative system. There are strong arguments for and against both of these systems of administration of justice, and part of your task in studying the law of evidence is to assess the merits of the adversary system which so many of the rules are designed
- 50 to protect.

The legislative process and the negotiation of contracts (a kind of private legislative process) hardly require comment. Although in both the participants must inform themselves of facts they do not know at the start, virtually no legal rules exist to control the methods of fact determination in these processes. It may be an interesting starting point for a critical appraisal of the rules of evidence in trial courts to consider why the common sense dictates that apply in legislation and contract negotiation cannot apply in court.

60

- Before plunging into the mass of detail in the cases, you ought to have in mind the general nature of the law of evidence. First you must remember that the trier of fact does not know anything about the facts of the dispute, although the hundreds of details may be thoroughly understood by both parties. The trier of fact must be told. That means that some individual (called a witness) must tell him. That witness must speak of what he knows and nothing more. He is asked to tell the truth, the whole truth, and nothing but the truth. Experience has taught centuries of triers of fact and advocates that this formula is simple to state and very difficult
- 70 to apply. Apart altogether from the witness who is prepared to lie and commit perjury, there are a great many other causes for inaccurate testimony. The witness may have a very poor memory, he may have poor eyesight or hearing,



he may be consciously or unconsciously biased, he may suffer from delusions, and so forth. Accordingly ways and means had to be found to overcome these dangers. The two most commonly in use are the oath and the device of cross-examination.

Of these two preventive measures to ensure that the truth is obtained the oath seems to be playing a declining part. Its use is still required in traditional courts, but administrative tribunals make less use of it, and experienced counsel differ in their opinions of its value. Perhaps the question to be asked is whether the witness is a modern sophisticate, caring nothing about his spiritual afterlife. Or whether he is a devout religious person, or whether he is a superstitious fellow.

Whatever value the oath may have in the modern view, Dean Wigmore has characterized cross-examination as "beyond any doubt the greatest legal engine ever invented for the discovery of truth." Note that the praise is qualified--it is only the greatest legal engine. Whether the use of truth serum, hypnotism, or the lie detector may someday supplant or at least supplement cross-examination remains to be seen.

By cross-examination a witness' story is subjected to testing by an examiner who is, to say the least, unsympathetic to the interest the witness represents. And the value of cross-examination is that it goes not only to the questions of veracity and sincerity but to perception, recollection and narration as well. It is interesting, too, that psychologists have discovered, independently, that if a witness is allowed to tell his own story in his own words, he will be more likely to speak accurately, but incompletely. When his memory is jogged by questions, he will recall more details, but curiously, his accuracy will drop. This decrease in accuracy may be the result of the witnesses' disinclination to admit, even to himself, that he didn't notice everything that occurred.

Although evidence is testimonial for the most part, it may be supplemented with what is sometimes called "real evidence", that is, material objects either brought before the trier of fact, or, occasionally, visited by the trier of fact, even when it means taking the jury to the scene of a crime. Although little appears in the law about the problem, the effect of "real evidence" is a matter of some concern, because triers of fact, especially juries, are apparently easily persuaded to draw irrelevant inferences from the sight of an object that cannot speak for itself, or be subjected to cross-examination. This is particularly so in the fixing of damages. Remember, however, that no "real evidence" goes in without accompanying testimony, and the witness introducing the "real evidence" must be able to identify it and explain it and subject himself to cross-examination, or the "real evidence" may not be received.

While we have supposed that the trier of fact knows nothing of the facts in dispute at the start of the trial, it must be remembered that he does know what "everybody knows" and he must use this knowledge in drawing inferences. This assumed knowledge is said to be judicially noticed, and need not(perhaps may not) be established by testimony. This area of attitudes, assumptions, biases, half truths and general misinformation that everybody possesses plays an important part in judicial thinking about facts and justice and presents especially difficult problems.

Of the hundreds of substantive rules of evidence two classes may be discerned that are fundamental or at least recur frequently. The first class relates to the procedure of hearing and deciding, in a case where the evidence is so evenly balanced that the trier of fact cannot make up his mind. He requires some rule to guide him since our system demands that a decision be reached. This equilibrium of mind is disturbed by application of what is called the burden of proof rule. By some process of reason or feeling one side or the other is required to prove his case to the satisfaction of the trier of fact and if he fails to do so, (which he does when he leaves the trier in a state of mental equilibrium), the trier must decide against him. Except that the trial judge must always instruct the jury on the application of this rule, and his malfeasance in this regard is a fruitful source of appeal, the burden of proof rules are not frequently invoked, but they do have, at times, some importance from the point of view of civil liberties, as when the Crown, in a criminal case, is required to prove its case beyond a

reasonable doubt. In modern times this requirement has been considerably modified, and in many cases it is now required that the accused show that he is innocent. These presumptions of innocence or guilt are in practical affairs sometimes embarrassing, but their careful application need embarrass no innocent man although the guilty will find it more difficult to escape scot free.

10 Unfortunately the expression "burden of proof" has acquired common use in connection with a quite different and wholly unrelated situation, where, in the course of trial, the question arises, who is to carry on with the case. If the plaintiff produces insufficient evidence for a trier of fact to come to a conclusion, clearly the judge may non-suit him. So, at the start, one party has what is sometimes called the risk of non-production of evidence (a hopelessly awkward expression) which he may discharge, whereupon the other party may reply with his evidence or let the case go directly to the trier of fact. In some situations, where, for example, on proof of fact A by one party the law recognises a presumption against the other party as
20 to the existence of fact B, that party has the risk of non-production of evidence, and if he fails to produce enough to enable the trier of fact to decide one way or the other, the trier of fact must decide against the party carrying the risk of non-production, if he finds fact A established to his satisfaction. This jockeying back and forth of the duty to bring in evidence is a commonplace in any trial and of vital importance to the parties. It ought to be clearly distinguished from the situation labelled "burden of proof".

30 The other class of rules may be conveniently referred to as the "exclusionary rules" and its purpose apparently is to keep unreliable evidence from the triers of fact. The most common example is the hearsay rule. You are invited to examine the rules critically to decide for yourself whether the objective of all of them is the same, whether it is to keep out unreliable evidence or to foster the adversary system, and whether they serve a useful and proper purpose.

40 Few rules of evidence are concerned with the weight of the evidence. Of course, if the weight is negligible and the time consumed to present the evidence is great, it might be kept out for reasons of convenience. But generally the rules of evidence decide whether a piece of evidence, no matter how weighty, ought to be let in. While you may wonder why the test of logical relevance is not enough, it is clear that much logically relevant evidence is excluded by the rules and much that is of little probative value is let in.

50 The determination of fact in an adjudicative process is not and probably cannot be a scientific search for absolute truth. It is inevitable that the facts be established by probabilities. If in any case a court were to act only on philosophical or even scientific certainties, justice would be so slow and cumbersome as to amount to injustice. A further consideration is to be noted: in any case where a witness is telling what he saw or heard, he is likely to attempt to report his experience in much more precise language than his experience and his ability to observe would justify. Nowhere is this more clearly seen than in the witness in an automobile collision case who is asked to place the cars involved in relation to each other and to the site of the collision at certain times. Such witnesses are likely to speak in terms of miles per hour and feet and even inches when their ability to observe, recollect and narrate would really justify only some hopelessly vague statement that "the cars were quite far apart and were
60 going pretty fast". Of course no counsel could win a case on that kind of testimony, so he proceeds on cross-examination to insinuate ideas about detail (if counsel for the other side hasn't already done so in office interviews). Hence you may hear cynical observations that the accident that happens is not the one that is tried in court. It is merely human nature to want to appear as a careful observer when cross-examining counsel asks those innocent sounding questions searching for further or corroborative detail that make cross-examination the snare it is for the unwary or dishonest witness.

70 Just as cross-examination has its tremendous advantages, so it is capable of great abuse, and no lawyer can call himself educated or competent who has never searched thoroughly for the proper limits of cross-examination.

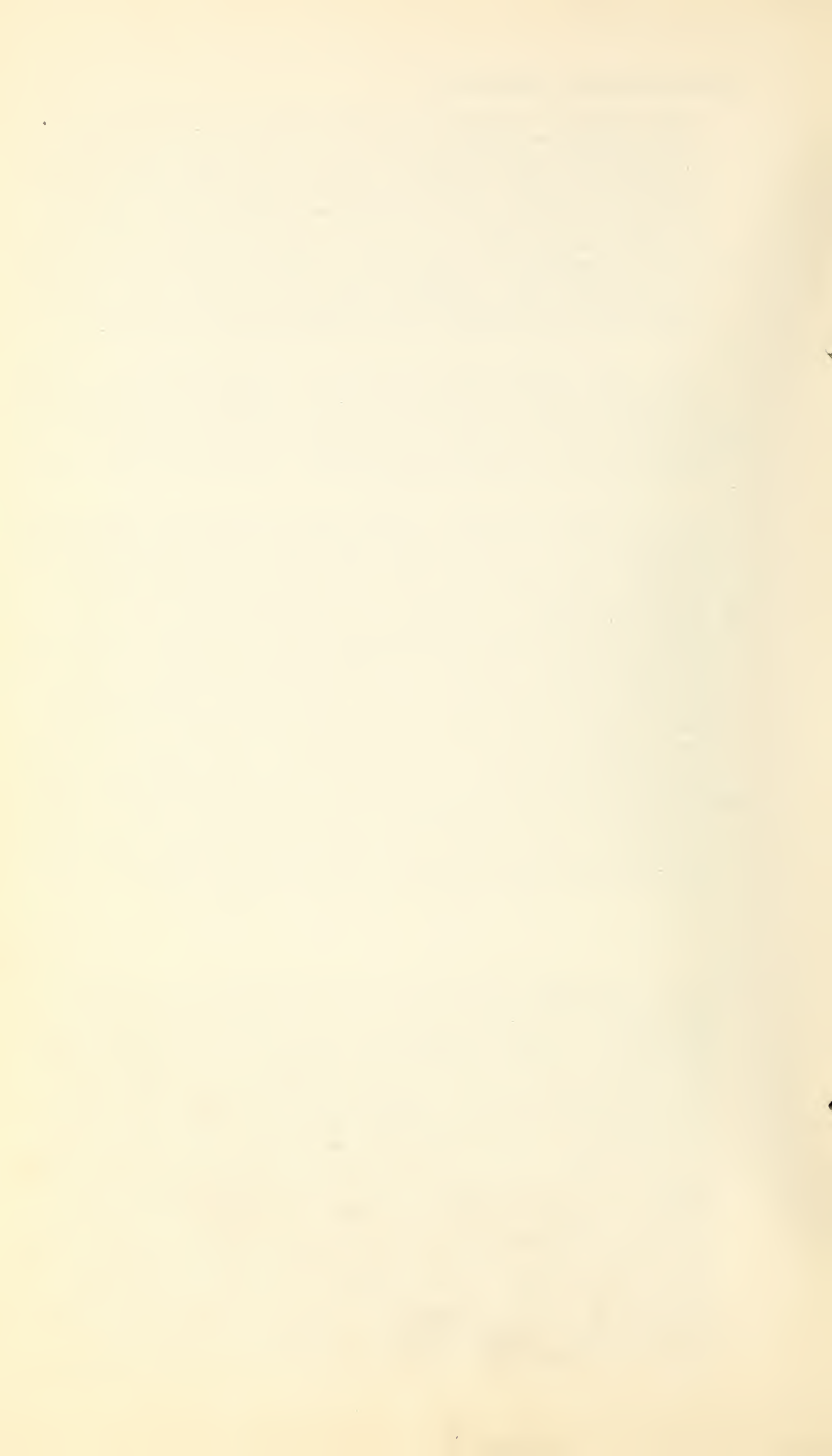
While we are considering the weight of evidence and its reliability,

a brief comment on "circumstantial evidence" may not be out of place. All testimony cannot be limited to that of eye witnesses of the fact to be proved, and much must be admitted from which an inference may be drawn of the truth of the fact to be proved. Needless to say caution must be used in framing such inferences, and hence logic and relevance are vital problems in the law of evidence. But it is pointless to adopt a wholly emotional attitude about the problem and discard all evidence based on circumstances from which inferences have to be drawn. It is no more unsafe than the testimony of witnesses who for some reason or other give inaccurate testimony of what they saw or heard. The problem rests in the validity of the inference to be drawn from the circumstantial evidence and the problem must be faced if facts are to be determined at all in most cases that come before our courts. Caution must be used, but that is very different from rejection.

You may well wonder why a system of evidence could not be confined to two rules: (i) that no irrelevant evidence is admissible, and (ii) that all relevant evidence is admissible unless its probative value is negligible or unless it is likely because of its emotional character unduly to prejudice the trier of fact and perhaps raise more questions in his mind than it settles. Maybe a system could be so confined. In any event it is a useful starting point for a critical analysis.

This casebook makes no claims to great originality of organization. The first chapter is intended to show you how far the rules of evidence are significant and what remedy lies for their breach. Without that insight you could not hope to analyse the problems raised by the subsequent cases and materials. This chapter also seeks to show you the relative positions of counsel, the judge, and the jury, and the proper functions of each. The second chapter deals in an orthodox way with judicial notice, relevance, burden of proof, presumptions and corroboration. All of these matters have one thing in common, they raise the basic problem of the judge's control over the determination of fact and over the trier of fact even where the judge rather than a jury is the trier of fact. The material on judicial notice goes a bit further than usual, because I raise the problem of introducing "social facts" into the record. For this reason the topic of expert testimony is examined at this point, although it does not have any direct bearing on the rest of the chapter. The next chapter deals with a miscellany of problems centering about the production of evidence and by the simple device of headings I have invited you to consider some of the implications of the law of evidence for civil liberties. The inclusion here of the topics of confessions, admissions, and documentary evidence ahead of their usual place as exceptions to the hearsay rule need raise no concern. They can be taken up wherever your instructor sees fit. The following chapters deal at some length with the hearsay exceptions and the parol evidence rule.

As a matter of convenience I am suggesting here a few texts that may be of some value while you are studying the problems raised by the materials, or, in any event, later on if you specialize in trial practice. All students of evidence are immensely indebted to Dean Wigmore, whose third edition of his ten volume treatise is an encyclopedia of the purpose, the principle, and the practice of the law of evidence as it is found in the Anglo- Canadian-American world. In addition you are strongly advised to examine Wigmore's The Science of Judicial Proof, a more manageable work in one volume. Both treatises are valuable not only for their legal and technical lore but also for their breadth of interest and example. Probably of no other legal text can it be so safely said that they can be read (parts of them at least) as a bedside book (slightly overweight). Phipson on Evidence (now in its 9th edition, 1952) is the standard English practitioner's text. As a source book of black letter law it is excellent but for the analysis of problems it is much less useful. There is also a student's manual with the same virtues and defects. Taylor on Evidence (12th ed., 1931) is a two volume work on a par with Phipson, but not so well known amongst students in this country. A new elementary treatise An Introduction to Evidence, by G. D. Nokes (1952) may be a convenient source for text material for review purposes. The classic work in Evidence apart from Wigmore's vast treatise is Thayer, Preliminary Treatise on Evidence at the Common Law, published in 1898 and today ranked as the first scholarly exploration into



the law of evidence in modern times. Maguire's Evidence, Common Sense and Common Law (1947) is the most useful short work for student use. It was written by a teacher of evidence law with great understanding not only of his subject but also of the student's needs and problems. As for Canadian materials, there is the new edition of the Canadian Encyclopedic Digest, revised to 1952. Apart from legal texts, you may find chapters one and fourteen of Bingham and Moore's How To Interview of some interest. But it is wise to keep in mind the observation of Professor MacIntyre in 30 Canadian Bar Review 645 (1952): "The modern law school offers the student a conducted tour and an opportunity to enlarge and refine his understanding of the law by the effort of writing his own text book in each of his courses." If there can be said to be a special morality for law students it must surely be that they take nothing for granted but think out their own views without undue influence by the remarks of judges, text writers or of their teachers, even in an introduction to a casebook.

September 25, 1952
School of Law
University of Toronto

J. B. Milner

